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JOHN T. FEY, Cle

Supreme Court of the United States

OCTOBER TERM, 1956

No. 189, Miscellaneous

CHARLES C. DeBERRY ..... Petitioner

V.

COMMONWEALTH OF KENTUCKY ..... Respondent

MOTION TO DISMISS
and
BRIEF FOR RESPONDENT

JO M. FERGUSON
Attorney General
ZEB A. STEWART
Assistant Attorney General
Counsel for Respondent
Commonwealth of Kentucky

I hereby certify that I have mailed a true copy of the within motion to Charles C. DeBerry at the Kentucky State Penitentiary, Eddyville, Kentucky, this the 5th day of October, 1956.

Zeb A. Stewart

Zeb A. Stewart
Assistant Attorney General
Frankfort, Kentucky

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Supreme Court of the United States

OCTOBER TERM, 1956
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CHARLES C. DEBERRY ----------*Petitioner*

V.

COMMONWEALTH OF KENTUCKY ----------*Respondent*

MOTION TO DISMISS
and
BRIEF FOR RESPONDENT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE JUSTICES OF THE SUPREME COURT CONSTITUTING THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

RESPONDENT'S MOTION TO DISMISS PETITION FOR WRIT OF CERTIORARI

Respondent moves the Court to dismiss the petition for writ of certiorari for the following reasons:

1. The Supreme Court of the United States is without jurisdiction to review the decision of the Court of Appeals of Kentucky in its opinion of January 27, 1956, reported in 289 S. W. 2d 495, (Advance Sheets No. 2 of May 29, 1956), affirming petitioner's judgment and sentence of death for wilful and premeditated murder imposed by the Jefferson Circuit

Court of Jefferson County, Kentucky, Second Criminal Division, Hon. L. R. Curtis, Judge. Rehearing was denied May 11, 1956.

The Court of Appeals of Kentucky has entered an order staying petitioner's execution pending the outcome of this proceeding, until and including November 26, 1956, as appears from order in the original record herein.

Since petitioner is proceeding in this Court as a pauper, the original record of the Court of Appeals of Kentucky was transmitted to the Clerk of the Supreme Court in the latter part of August, 1956.

2. No such federal question is presented as would warrant the Supreme Court to grant certiorari.

This Court has in a long line of decisions extending over many years steadfastly adhered to the following well-known rule of law, viz:

Where a conviction for a violation of a state statute has been affirmed by the court of last resort of that state and has been conducted according to long established precedent and rules of evidence, there is no such denial of the due process clause of Section 14 or any other section of the Federal Constitution invoked by petitioner such as to warrant granting certiorari to review the action of the Court of Appeals of Kentucky in affirming petitioner's conviction.

Howard v. Kentucky, 200 U.S. 164; Gilbert Tinsley v. Commonwealth of Kentucky, Writ of Certiorari denied October 12, 1953, 74 S. Ct. 22; Ed Milam v. Commonwealth of Kentucky, Writ of Certiorari denied June 6, 1955, 75 S. Ct. 897; Chester Merrifield v. Commonwealth of Kentucky, 75 S. Ct. 360; Leonard Tarrence v. Commonwealth of Kentucky, 75 S. Ct. 220; Tommy Nelson v. Commonwealth, 65 S. Ct. 86; Bass v. Commonwealth, 65 S. Ct. 64; Bircham v. Commonwealth, 72 S. Ct. 55.

BRIEF FOR RESPONDENT

Statement of the Case

The petitioner was indicted under §435.010 of the Kentucky Revised Statutes for the wilful murder of Richard V. Eddins who was, at the time he was shot and killed by petitioner on the night of January 2, 1955, the night watchman at the River Road Country Club near Louisville in Jefferson County, Kentucky. The indictment jointly charged Petitioner DeBerry, Burney Davis, Jr., Willie Childress, Curtis Coleman, John Lancaster, and Nelson McElroy with the commission of this crime. At petitioner's separate trial he was found guilty and sentenced to death in the electric chair at the Kentucky State Penitentiary at Eddyville, Kentucky. From said judgment he prosecuted an appeal to the Court of Appeals of Kentucky, which Court on January 27, 1956 affirmed said conviction in an able, well-written and clear-cut opinion by Justice Montgomery, the entire Court concurring. See 289 S. W. 2d 495, Advance Sheet No. 2 of May 29, 1956, not yet appearing in a bound volume of South Western Reporter.

The material evidence for the Commonwealth, as recited in the opinion of the Court of Appeals, is as follows:

> "Appellant (petitioner herein), in company with Burney Davis, Jr., Willie Childress, Curtis Coleman, John Lancaster, and Nelson McElroy, Negroes, conspired to enter and to rob the safe at the River Road Country Club near Louisville, Kentucky, on January 2, 1955. They were armed with two pitsols and a sawed-off shotgun. McElroy was a professional safecracker.
>
> "By agreement, the six conspirators arrived in two cars at Mellwood Park, where further discussion was had concerning their plans. Curtis Coleman previously had worked at the Club. He furnished the information on the layout of the Club, including the duties of the night watchman. It was agreed that some disposition might have to be made of the watchman.

"McElroy had a boil on one arm, limiting his use of it. He stayed at a nearby tavern, to be called if needed. Lancaster drove the others to the Club and was to drive McElroy there when called. Coleman stayed outside the Club as lookout.

"Davis, Childress, and appellant entered the Club building. On hearing approaching steps, they hid in the women's locker room. There, they were discovered. Appellant fired three shots from a .45 caliber automatic at Richard V. Eddins, the night watchman, thereby killing him. Eddins was unarmed.

"Appellant made two full statements admitting the homicide. The first statement consisted of six handwritten pages and the second consisted of six single-spaced typewritten pages. Each statement was in detail. At the trial, appellant, in conflict with the statements, said that he did not enter the Club and that he could not tell the jury whether he killed Eddins because he was 'high' on 'dope.' No mention was made in either statement that appellant had used cocaine or was under the influence of a narcotic drug at the time he shot Eddins.

"The evidence was in conflict as to whether appellant indulged in the 'sniffing' of cocaine furnished by McElroy while on the way to the Club and whether he was under the influence of narcotic drugs at the time of the shooting. Thus, it was a question of fact to be submitted to the jury."

Petitioner was ably represented at his trial and in the Court of Appeals by experienced counsel. He seems to have presented his own case in this Court with some considerable skill and about as ably as it appears could be done by the best of counsel under the circumstances. We are convinced there are no federal questions involved such as warrant this Court to grant certiorari. These grounds are the same as relied on in the Kentucky Court of Appeals and duly considered and passed upon adversely to petitioner, and are as follows:

1. The jury reported its verdict in twenty minutes after the case was submitted to it and after the jury had gone to its rooms to consider its verdict.

2. The trial court did not give the jury the whole law of the case.

3. Petitioner, by reason of the use of narcotic drugs, did not know what he was doing at the time of and before the killing and was not capable of forming in his mind a felonious intent to commit the crime with which he was charged and convicted.

Argument and Authorities

The contentions made and argument advanced in this Court now are essentially the same as advanced and fully litigated in the Kentucky Court of Appeals by way of review of the proceedings of the Jefferson Circuit Court, Criminal Division. All of these points were deliberately considered and correctly dealt with by the Kentucky Court of Appeals in its opinion and it is our contention that the Supreme Court is precluded from reviewing this case by certiorari because of lack of involvement of a federal question.

We will now undertake to answer these points in their order. In so doing, we follow the reasoning and employ some of the language of the Kentucky Court of Appeals in this case, to-wit:

> "The felonious intent formed by appellant to do the unlawful act planned was sufficient to impute to appellant the necessary element of felonious intent or malice for the homicide committed. The jury was justified in inferring felonious intent to commit the murder. One who in the commission of a wrongful act commits another wrong he did not mean to commit is nevertheless liable for the latter wrong. The law implies malice when one deliberately injures another in an unlawful manner. Roberson's Criminal Law, Section 20, page 27; 14 Am. Jur., Criminal Law, section 26, page 786, and section 28, page 787. See discussion of imputed malice in Powers v. Commonwealth,

110 Ky. 386, 61 S. W. 735, 63 S. W. 976, 53 L.R.A. 245.

"The same rule has been held to apply to the use of cocaine and other drugs not taken as a medicine to determine criminal responsibility as applied to that of a person drunk from the voluntary use of intoxicating liquors. Roberson's Criminal Law, Section 69, page 104. One who commits a crime under the influence of a drug should be held guilty if he takes the drug knowing the effect it is likely to have. 1 Wharton and Stille, Med. Jur., Section 245. Appellant previously had used drugs and must have anticipated the probable or possible effect of his use of cocaine.

"In Roberson's Criminal Law, Section 63, page 91, the rule is given thus: 'Drunkenness will not excuse or condone homicide, and constittues no defense to an indictment therefor, even when the accused was unconscious of the nature of the act, if that condition of his mind was the result of voluntary intoxication, with a knowledge of the effect of liquor on his passions.' Consequently, when one with a proven premeditated determination arms himself and takes intoxicants as a part of his preparation for a homicide, his drunkenness is of no weight to explain away his malice. Roberson's Criminal Law, Section 65, page 97. No valid distinction can be seen between the use of drugs and intoxicating liquor or when the homicide is a consequence of another wrongful but intended act instead of a premeditated homicide. Shannahan v. Commonwealth, 71 Ky. (8 Bush) 463, 8 Am. Rep. 465; Harris v. Commonwealth, 183 Ky. 542, 209 S. W. 509; Tate v. Commonwealth, 258 Ky. 685, 80 S. W. 2d 817; Hall v. Commonwealth, 258 Ky. 744, 81 S. W. 2d 404; Smiddy v. Commonwealth, 287 Ky. 276, 152 S. W. 2d 949.

"The evil of the rule sought by appellant early was recognized in the Shannahan case above, where it was written:

> '* * * men of violent passions and wicked designs would avail themselves of this very principle of law, by becoming drunk in order to take the lives of their

fellowmen, with the consciousness on the part of the offender that his drunkenness would be the mitigating feature of his case. The recognition of such a rule of law is but an invitation to men of reckless habits to commit crime; and while their punishment is by incarceration only in the state prison for a few years, the sober man, whose cause for revenge and the desire to take human life therefor is kept within his own breast, for the commission of a like offense is made to suffer death. There is no reason or philosophy in a law that would hang the sober man for murder, and lessen the punishment of the man intoxicated for the same offense, because the latter had voluntarily placed himself in a condition by which he is induced to take human life.'

"The voluntary manslaughter instruction sought by appellant was not justified under the proof of this case, and instruction No. 4, as given by the trial court, was more favorable to appellant than that to which he was entitled.

"We find no merit in the contention that the jurors did not properly consider the case because they were out only twenty minutes. The members of the jury, undoubtedly, were thinking about the case while hearing the evidence, instructions of the court, and argument of counsel, thus requiring very little time to reach a decision on the guilt and punishment of appellant. Under the facts of this case, it is readily understood how the jury was able to reach its verdict in the time used.

"Judgment affirmed."

The petition for certiorari and argument advanced to support it merely contain broad, general and non-specific allegations to the effect that petitioner's constitutional rights guaranteed under the Fifth, Sixth and Fourteenth Amendments of the Federal Consitution have been violated. He contends that this Court has jurisdiction to grant the writ of certiorari prayed under Rule 19 of this Court. Respondent denies this. We quote

below Sections 1 and 1(a) of Supreme Court Rule No. 19, as follows:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> "(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court."

There is no federal question presented or involved here nor in the trial court or the Kentucky Court of Appeals. No constitutional question, either state or federal, is involved which would warrant granting certiorari.

Fifty years ago Your Honors, in the case of Howard v. Kentucky, 200 U.S. 164, wrote an opinion which has been followed since without variation or shadow of turning. Voluminous precedent from many courts was cited in the Howard opinion. We quote below from the syllabus the substance of that holding:

> "The provisions of the Fifth and Sixth Amendments to the Federal Constitution do not apply to proceedings in the state courts.
>
> "A state cannot be deemed guilty of violating its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, if acting within its jurisdiction.
>
> "While the words 'due process of law,' as used in the Fourteenth Amendment, protect fundamental rights, the Amendment was not intended to interfere with the power of the State to protect the lives, liberty and property of its citizens, nor with the power of adjudication of its courts in administering the process provided by the law of the State."

The cases cited in the motion herewith to dismiss the petition for writ of certiorari are also invoked and relied on in the event the Court should see fit to take jurisdiction and review the case by the grant of certiorari sought by petitioner.

CONCLUSION

It is therefore insisted that the motion to dismiss for want of jurisdiction should be sustained; that in no event should certiorari issue.

Respectfully submitted,

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COMMONWEALTH OF KENTUCKY